IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22379 of 2005
With
SPECIAL CIVIL APPLICATION No. 22385 of 2005
With
SPECIAL CIVIL APPLICATION No. 22391 of 2005
With
CIVIL APPLICATION Nos 12966 and 12967 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ANILBHAI NATUBHAI PATEL - Petitioner(s)
Versus
JAYRAJBHAI JAYANTIBHAI PATEL & 7 - Respondent(s)

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Appearance :
MR IQBAL SYED for Petitioner(s) : 1,
MR L NAGESHWAR RAO with ASIM PANDYA for HL PATEL ADVOCATES for Respondent(s) : 1, 6, 7,
MR SB VAKIL with MS. KRUTI M SHAH for Respondent(s) : 2,
MR SP HASURKAR AGP for Respondent(s) : 3, 4, 5, 8, 9.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 23/02/2006

COMMON CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

In these petitions under Article 226 of the Constitution, three councillors of Anand Municipality have challenged the election of the first respondent herein (Jayrajbhai Jayantibhai Patel) as President of the Anand Municipality on 8.11.2005.

The petitioner in Special Civil Application No.22391 of 2005 has also prayed that petitioner – (Vijaybhai Haribhai Patel) be declared as having been elected as the President of Anand Municipality. The petitioners in the other two petitions have supported the prayer for the said declaration.

2. Since the Gujarat Municipalities Act, 1963 does not provide for any machinery or forum for determining challenge to election of President and Vice President of the Municipality, this Court has entertained the petitions and heard them on merits.

FACTS

3. Elections to the Anand Municipality were held on 25.10.2005 and the results were declared on 27.10.2005. Out of total 42 councillors, 19 were elected as the candidates sponsored by BJP and the other 23 candidates were elected as independent candidates. On 29.10.2005, the Collector, Anand issued a notice under Section 32 of the Gujarat

Municipalities Act, 1963 (hereinafter referred to as “the Act”) and Rules 3 and 4 of the Gujarat Municipalities (President and Vice President) Election Rules 1964 (hereinafter referred to as “the Rules” or “the Election Rules”) declaring the program for election of President and Vice President of the Anand Municipality on 8.11.2005 at 1.00 PM in the Anand Municipality meeting hall. At the meeting conducted on 8.11.2005 presided over by the Resident Deputy Collector nominated by the Collector, out of 42 elected councillors of the Municipality, 38 were present, two councillors – Anilbhai Patel and Meenaben Gohil were not present because they were arrested by the police at about 12.30 PM on the date of meeting. As per the provisions of Section 33(1)(a) of the Act and as per the Government notification dated 9.7.2002, it was decided at the meeting that for the first two and a half year term, the office of President was not reserved for any class. As far as the office of Vice President is concerned, the term is five years.

4. As per Rule 6 of the Election Rules after the term of the President and Vice President is determined at the meeting, the Presiding Officer shall invite nominations for the election of the President. Similarly, at the meeting nominations are also to be invited for the office of the Vice President where such election is due. Two councillors offered their candidature for the office of President. 19 councillors cast their vote in favour

of the first respondent by show of hand. Thereafter the other 19 councillors cast their vote in favour of Vijaybhai Haribhai Patel (petitioner in Special Civil Application No.22391 of 2005). There is no dispute about the fact that there was no overlapping and the 19 councillors who voted in favour of the first respondent were different from the 19 councillors who voted in favour of Vijaybhai Haribhai Patel. In view of equality of votes, on the basis of provisions of sub-section (4) of Section 32, the Presiding Officer drew lots and the first respondent (Jayrajbhai Jayantibhai Patel) was declared as elected as President of Anand Municipality w.e.f. 8.11.2005 for a term of two and a half years.

5. Similar procedure was followed for electing the Vice President for which office, there were two candidates, namely Ghanshyambhai Khemchandbhai Khatri and Mohammedsafi Gulamnabi Vora (the second respondent). For elections to this office also, 19 members voted in favour of Ghanshyambhai Khemchandbhai Khatri and the other 19 members voted in favour of the second respondent. Here also, in view of equality of votes, on the basis of the provisions of sub-section (4) of Section 32 of the Act, the Presiding Officer drew lots and on that basis declared the second respondent as the Vice President of the Anand Municipality for a term of five years as the term of the Vice President is co-terminus with the term of the Municipality.

BASIS OF THE PETITIONS AND PRAYERS MADE

6. The present petitions are filed by three councillors – Anilbhai Nathubai Patel, Meenaben Pratapbhai Gohil and Vijaybhai Haribhai Patel alleging that just before the meeting of the Municipality was to commence for holding the aforesaid elections at 1.00 PM on 8.11.2005, at about 12.30/ 12.35 PM Anilbhai Nathubhai Patel was arrested in relation to an offence registered under the Copy Right Act and Meenaben Pratapbhai Gohil was arrested in connection with an offence under the Bombay Prohibition Act. It is contended that the arrest of both the councillors was so timed as to prevent both of them from voting at the elections of President and Vice President, as the BJP had secured only 19 seats out of 42 seats and there were 23 independents. Out of the 23 independent councillors, 21 councillors had formed their group under the banner of “Anand Shaher Vikas Manch” (Anand City Development Council) (hereinafter referred to as “the Vikas Manch”) and they had sponsored two independent councillors for the offices of President and Vice President. The petitioners and other independent councillors had decided to move out of Anand city from 4.11.2005 to 7.11.2005 with a view to make themselves inaccessible to the local BJP leaders who were trying to win them over and they visited places like Surat, Nasik and Shirdi. It is further contended that since the local party leadership was unable to win over any of the 21 independent candidates united under the Vikas Manch,

they resorted to the unfair means as well as abuse and misuse of powers of the Police Officers by getting false FIRs filed on 5.11.2005. In the FIR under the Copy Right Act, Pareshbhai Patel and Anilbhai Patel were named as the accused. Meenaben Gohil was not named as an accused in the FIR filed against Premilaben Manibhai @ Popatbhai Gohil. Pareshbhai Patel and Premilaben named as accused in the two separate FIRs were arrested in the evening of 5.11.2005 and released on 6.11.2005.

7. When the independent councillors were about to enter the meeting hall of the Anand Municipality at about 12.30 PM on 8.11.2005, the Police Officers (respondent Nos.3 to 5) and Police staff and the constables under them arrested Anilbhai Patel and Meenaben Gohil at 12.30 PM and 12.35 PM respectively. It is the case of the petitioners that the arrest was made just half an hour before the scheduled time of elections in order to prevent Anilbhai Patel and Meenaben Gohil from exercising their votes at the elections and to tilt the election results in favour of the candidates of the BJP party; that both Anilbhai Patel and Meenaben Gohil were to vote for the candidates sponsored by the Vikas Manch (including Vijaybhai Patel for the office of President), but because they were arrested and forcibly dragged away from the meeting room, they could not exercise their vote in favour of the candidates of the Vikas Manch. They were released on bail upon being produced before the learned JMFC at

about 5.00 PM after they were moved in jeep between 12.30 PM and 4.00 PM without any reason and thereafter taken to the police station. They were not produced before the learned JMFC till 4.00 PM only with a malafide intention to see that they were released on bail only after the general board meeting was over and the election results were declared. It is, therefore, submitted that if these two petitioners Anilbhai Patel and Meenaben Gohil had not been arrested, both of them could and would have voted in favour of Vijaybhai Patel who would have secured 21 votes against 19 votes secured by the first respondent (Jayrajbhai Jayantibhai Patel). It is submitted that respondent Nos.3 to 7 and other police personnel acted in a highhanded and arbitrary manner only with the malafide intention to help BJP and their official candidate to win the election to the offices of President and Vice President of Anand Municipality. It is further alleged that respondent Nos.8 and 9 obliged respondent Nos.3 to 5 by exercising their political influence in preventing their transfer and also in preventing departmental actions against respondent No.5. It is further alleged that respondent Nos. 4 to 7 and other police personnel have acted as per the direction of respondent Nos.3 and 5.

8. In these petitions, the petitioners have challenged election of the first respondent as President of the Anand Municipality. Although prayer (b) was widely worded to challenge the proceedings of

the meeting of Anand Municipality held on 8.11.2005, at the hearing of the petitions, Mr Iqbal Saiyed, and Mr Vakharia, learned counsel for the petitioners have stated in categorical terms that they are challenging the proceedings of the meeting held on 8.11.2005 only in so far as election to the office of President is concerned, and that they are not challenging the election to the office of Vice President because the 21 independent candidates forming the Vikas Manch had made a common cause of electing President and Vice President from amongst themselves and not to elect any BJP councillor. Since Mohammedsafi Gulamnabi Vora, a councillor in the Vikas Manch, is otherwise also declared as elected at the meeting held on 8.11.2005 by draw of lots, the petitioners are not challenging the election of the Vice President.

9. The petitioners had also initially prayed for appropriate writ to direct the Police Officers to pay appropriate compensation to Anilbhai Patel and Meenaben Gohil for their wrongful arrest and for non-compliance with the requirements laid down in DK Basu's case. But at the hearing the learned counsel for the petitioners stated that the petitioners would not press this relief in these proceedings and pray for liberty to file other substantive proceedings for this relief.

In other words, the challenge in the petitions is now confined to the election to the

office of President of Anand Municipality on the ground that but for the Police Officers arresting Anilbhai Patel and Meenaben Gohil half an hour before the elections on 8.11.2005, the result of the election would have been materially different and instead of the first respondent (Jayrajbhai Patel), Vijaybhai Patel would have been declared as elected to the office of President. By amendment granted on 19.12.2005, Vijaybhai Patel made a prayer for such declaration in his petition and the other two petitioners have supported the same throughout.

SUBMISSIONS ON BEHALF OF PETITIONERS

10. In support of the contention that the arrest was unlawful or at least was made in an arbitrary manner and only in oder to prevent the petitioners from participating in the elections and voting at the elections, Mr Saiyed, learned counsel for the two petitioners has taken the Court through the relevant first information reports and the complaints made by Anilbhai Patel protesting against the untimely arrest. It is submitted that in the FIR dated 5.11.2005 filed under the Copy Right Act there were two accused Pareshbhai Patel and Anilbhai Patel. Pareshbhai was arrested in the evening of 5.11.2005 and without being produced before the learned Magistrate or without his having obtained any bail order from any Court, the Police on their own released Pareshbhai Patel on the next day. It is submitted that, therefore, the police authorities

themselves had not considered the offence to be so serious that Anilbhai Patel was required to be arrested on 8.11.2005 at 12.30 PM just half an hour before the scheduled elections. It is submitted that in any case Anilbhai Patel could have been permitted to vote at the meeting and thereafter upon his coming out of the meeting room he could have been arrested. It is also pointed out that on 8.11.2005 Anilbhai Patel had in fact gone to the Court of the Additional Sessions Judge at Anand and had submitted anticipatory bail application before going to the election meeting and it was specifically mentioned in the said application that he was apprehending the arrest for political reasons so that he cannot participate in the elections, a copy of the anticipatory bail application being Misc. Criminal Application No.507 of 2005 filed on 8.11.2005 is also placed on record. Similarly, Anilbhai Patel has placed on record a copy of the complaint filed in the Court of learned Judicial Magistrate First Class at Anand on 9.11.2005 (registered as Criminal Misc. Application No.6233 of 2005) against the three police officers – respondent Nos.3, 4 and 5 herein and eight to ten other police men who can be identified on seeing them. In the said complaint, it is stated that when the complainant (petitioner Anilbhai) was going for voting on 8.11.2005 for election of President/ Vice President of the Municipality, from outside the door of the Boardroom the complainant-petitioner was beaten with fist blows and pushed, and the complainant-petitioner and another woman councillor

(Meenaben Gohil – petitioner in SCA No.22385 of 2005) were forcibly made to sit inside the police van and that the police officers had taken the complainant-petitioner and the other woman councillor in the van till evening and, therefore, the complainant-petitioner and the other woman councillor could not exercise their right to vote at the elections of President and Vice President. It was also stated in the said complaint that the police officers had illegally conspired with the prominent leaders of the Bhartiya Janta Party and had filed false cases against the complainant petitioner and woman councillor and the police officers had illegally detained two of them as a part of the conspiracy to deprive them from voting at the elections. Apart from the complainant himself (petitioner in SCA No.22379 of 2005) and councillor Meenaben Pratapbhai Gohil (petitioner in SCA No.22385 of 2005), the following were named as witnesses:-

1.Mohammed Safi Gulamnabi Vohra
2.Idrishbhai HajiIsmailbhai Vohra alias Bhanabhai
3.Shashikant Manubhai Patel

On the said complaint, the learned 2nd Addl. Senior Civil Judge & JMFC, Anand passed orders datd 10.11.2005 directing that the Superintendent of Police, Anand District shall conduct investigation of the allegations in the complaint under Section 202 of Cr PC and hand over the report to the Court and it

was further directed that the Superintendent of Police, Anand shall not transfer the investigation of this complaint to any other officer without the prior permission of the Court. It was stated at the hearing of these petitions that the report is not as yet filed by the Superintendent of Police, Anand.

11. Similarly, regarding Meenaben Gohil (petitioner in SCA No.22385 of 2005), it is stated that she was not named in the FIR lodged under Sections 66(1)(b), 65(a), 81 and 116 of the Bombay Prohibition Act. In the FIR Mrs Premilaben Manibhai alias Popat Ranchhodbhai Gohil and adult member of daughter who was residing with her are arraigned as accused. The FIR lodged by police constable Rajendra Mohanram on patrol duty mentioned that during patrolling, information was received from a private informant to the effect that Pratapbhai Ranchhodbhai Gohil is selling country made liquor and foreign liquor of other provinces. On the basis of the said information, the informant and the police constable had gone to the resident of Pratapbhai where a lady, who gave her name as Premilaben, was found present and three bottles of Indian made Foreign liquor were found of the value of Rs.200/- each and no permit was produced by Premilaben. On that basis it was inferred that Premilaben was involved in the sale of the aforesaid three bottles of foreign liquor and an offence under Section 66(1)(b), 65(a) and 81 was registered against Premilaben and her other adult member residing with her. Although the FIR does

mention that the information was received against Popatbhai R Gohil, he has not been named as an accused. It is also contended that the averments in the FIR nowhere make out any offence under Section 65(a) of the Bombay Prohibition Act and still a reference to that section was made deliberately only with the intention to make the offence non-bailable as provided under Section 119 of the Bombay Prohibition Act. Premilaben was arrested on 5.11.2005 and released on bail on 6.11.2005 after having been produced before the learned JMFC. It is submitted that apart from the fact that Meenaben Gohil, wife of Pratapbhai R Gohil, was not arraigned as accused in the FIR and that she was not required to be arrested merely because she is related to Premilaben. Even otherwise, it is submitted that the the alleged offence was not so serious (maximum punishment would be 3 years sentence) that Meenaben was required to be arrested just half an hour before the elections and that in her case also she could have been arrested after she would come out of the meeting room after attending the meeting for electing the President and the Vice President.

Meenaben has also alleged that she was arrested by the police just half an hour before the elections and taken in the police van and moved around Anand town and was not even presented before the learned Magistrate till 4.00. It is also contended that Meenaben was available in Anand town from early morning of 8.11.2005 and could have been

arrested in the morning and produced before the learned JMFC in which case she would have got bail even before the scheduled time of the elections at 1.00 PM or in the alternative, the police officers could have arrested the petitioner after the election meeting was over. However, the police exercised their powers malafide with the only intention of preventing her from exercising her right to vote against the official candidate of the Bhartiya Janta Party and in favour of the candidate sponsored by the independents under the banner of Anand Shaher Vikas Manch.

12. The petitioners have also made allegations of mala fides against the police officers, particularly the third respondent (BC Bhandari, Police Inspector, LCB, Anand Police Station) and the fifth respondent (RB Patel, Police Inspector, Anand Town Police Station) -

(i) allegations in the FIRs in connection with which Anilbhai Patel and Meenaben Gohil were arrested did not constitute cognizable offences.

(ii) both Anilbhai Patel and Meenaben Gohil were arrested around 12.30 PM and they were dragged into the police van and moved around in Anand town and they were not produced before the learned JMFC till the election meeting was over and the results were declared and upon being granted bail by the

learned JMFC, they were released at 5.00 PM.

(iii) Anilbhai Patel was arrested by the police under instructions of respondent No.3 BC Bhandari. According to petitioner Anilbhai Patel, he had informed respondent Nos.3 to 5 and other subordinate police personnel that the petitioner was prepared to surrender himself to the police officers but before that he may be allowed to exercise his legitimate right to vote, but respondent No.3 along with other police personnel caught and dragged petitioner Anilbhai Patel forcibly from the staircase of the meeting hall and put him inside the police van. Respondent Nos.3 to 5 also did not show any warrant to the petitioner and manhandled the petitioner and humiliated him in public by abusing and giving him fist blows.

(iv) It is further alleged by petitioner Meenaben Gohil (SCA No.22385) and petitioner Vijaybhai Patel (SCA No.22391) that respondent Nos.3, 4 and 5 Police Officers at Anand Police Station, are able to continue their posting at Anand on account of political influence of respondent Nos.8 and 9 (respondent Nos.6 and & in SCA No.22391) who are MLA Anand and General Secretary, Anand District Bhartiya Janta Party respectively and who are influential local

BJP leaders having great political influence over the police officers and other local officers of Anand.

(a) The third respondent has been able to maintain his posting at Anand (where he has built his own residential bungalow and where he stays with his family) and/or nearby places, like Nadiad and Borsad for the last ten years with the political influence of the eighth respondent. The third respondent was transferred from Anand to State CID Crime at Ahmedabad about six months ago, but he managed to get his transfer cancelled through the political influence of the eighth respondent. The third respondent has for all practical purposes become a resident of Anand city for the last more than ten years.

(b) The fifth respondent is a police inspector at Anand Town Police Station. It is alleged that his immediate subordinates were charged with the offence of taking bribe about three months ago and that in such case even the higher officer as the Head of police station is transferred and departmental action is taken for lack of supervision, but on account of intervention of the eight respondent, the fifth respondent (RB Patel) is saved from departmental action as well as

transfer.

SUBMISSIONS ON BEHALF OF RESPONDENTS

13. In reply, Mr Hasurkar learned AGP appearing for the Resident Deputy Collector, Anand who presided over the meeting, submitted that the Resident Deputy Collector conducted the meeting in accordance with the relevant statutory provisions and, therefore, there was no illegality as far as the proceedings at the meeting are concerned. On behalf of the police officers, learned AGP Mr Hasurkar has submitted that the police officers were merely discharging their duties in arresting Anilbhai Patel and Meenaben Gohil because cognizable nonbailable offences were registered against them on 5.11.2005 and they were not available till 7.11.2005 and, therefore, there was nothing wrong in arresting these two accused on 8.11.2005. It is submitted that there is no law prohibiting the arrest of any municipal councillor against whom an offence is registered. It is submitted that since allegations of malafides are denied, the petitions may be dismissed.

14. Mr Asim Pandya, learned counsel appeared for the first respondent (Jayrajbhai Jayantibhai Patel) who was declared elected as President of Anand Municipality at the meeting held on 8.11.2005, the sixth respondent (Mr Dilipbhai M Patel, MLA, Anand) and the seventh respondent (Kantibhai Shankarbhai Chavda, General Secretary, BJP, Anand). Mr Pandya has

opposed the petitions and submitted that since elections were held on 8.11.2005 in accordance with the relevant statutory provisions, the petitions do not deserve to be entertained by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution. Mr Pandya has also relied on the affidavits filed by the above named respondents to the effect that they had not brought any pressure on the police officers for arresting Anilbhai Patel and Meenaben Gohil against whom offences were already registered on 5.11.2005 and who were not available for arrest till the date of elections.

15. After the memo of petition in SCA No.22391 of 2005 filed by the defeated candidate was permitted to be amended on 19.12.2006 for inserting the prayer that the said petitioner be declared elected as President of the Municipality on 8.11.2005, all the three petitions were heard on 26.1.2006, particularly regarding relief to be granted in case the petitions are allowed and election of the first respondent as President of the Municipality is set aside.

16 Mr Nageshwar Rao, instructed by Mr Asim Pandya appeared for the first respondent and submitted as under:-

(i) The case involves complicated questions of fact and also allegations of malice in fact and, therefore such questions are required

to be tried in a civil suit and not in a writ petition under Article 226 of the Constitution. Reliance was placed on the decisions of the Apex Court in -

(i) 1973 SCC 386 (392 Para 18)
(ii) AIR 1959 SC 942 (951 Para 17)
(iii) AIR 1964 SC 1006 (1011 Para 17)

(ii) The second respondent (Vijaybhai Haribhai Patel) who secured equal number of votes with the first respondent and who lost only at the time of draw of lots took the chance of succeeding and, therefore, his petition deserves to be dismissed on the ground of waiver. There was no protest raised by any councillor present at the meeting against the elections being held in absence of the two councillors arrested by the police. Neither the defeated candidate nor any other councillor invoked the provisions of Rule 10 for postponing the election meeting. Reliance is placed on the decisions in -

(i) 1986 Supp. SCC 285
(ii) AIR 2002 SC 2322

(iii) The petitions were filed after delay of eight days. When the petitions are based on serious allegations of malafides, nothing prevented the petitioners from approaching the Court immediately after the elections

were held on 8.11.2005.

(iv) The prayer of the defeated candidate for a declaration of having been elected as President is not covered by any statutory provision, such as Section 101 of the Representation of the People Act, 1951 where a defeated candidate can succeed in getting declaration of having been elected only when on recount he secures more votes or when the elected candidate is shown to have resorted to corrupt practice, but neither of these grounds is available in the facts of the present case as both the candidates had obtained equal number of votes and it was only by draw of lots that the first respondent came to be elected.

(v) The scope of judicial review is very limited as held in -

(i) (1994) 3 SCC 1
(ii) (1992) Supp 2 SCC 312 (paras 7 & 8)
(iii)(2003) 9 SCC 592

(vi) The allegations of malice in fact cannot be accepted unless strong evidence is adduced. In support of this proposition, reliance is placed on the decision in AIR 1976 SC 1766.

17. Mr YF Mehta appeared for applicants Shwetalkumar Arvindbhai Patel and Chetankumar

Manibhai Patel, who were the two other councillors who were not present at the meeting held on 8.11.2005 for electing the President and Vice President of the Anand Municipality. Those two councillors filed Civil Application Nos.12966 and 12967 of 2005 on 27.12.2005 for being joined as party respondents. Mr YF Mehta appearing for them submitted that in case the Court sets aside the election of respondent No.1 as president of Municipality, no further relief should be granted in favour of the defeated candidate, but at the most, the authorities may be directed to hold fresh elections to the offices of President and Vice President where these two applicant councillors would also like to vote. It is stated in these two applications that on the date of filing the applications also (i.e. on 27.12.2005) the BJP enjoyed the support of the majority of the councillors i.e. 19 councillors belonging to BJP and more than two independent councillors.

As regards their absence on 8.11.2005, each of the applicants has stated in the respective applications as under :-

> "3. On 8th November 2005 i.e. the day on which the election for the post of President and Vice President was to be held, the group of independent councillors, their servants and agents kept the applicant out of Anand town by deceitful means. The applicant, therefore, could not cast his vote in the

> election. The applicant though prevented from casting vote, did not raise any grievance before any authority or before any other forum as in the election for the post of President and Vice President of Anand Municipality the President set up by Bharatiya Janata Party got elected.
>
> 4. ..... If the applicant were not prevented by the group of independent councillors, their servants or agents by fraud and deceit from casting vote on 8th November 2005. The applicant would have definitely voted for Shri Jayrajbhai Jayantibhai Patel (first respondent) who was set up as the candidate of Bharatiya Janata Party for the office of President and Shri Ghanshyam Khemchand Khatri the candidate for the office of Vice President."

Mr YF Mehta submitted that right to vote at an election is not a fundamental right and Section 62(5) of the Representation of the People Act, 1951 provides that no person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police, provided that this bar does not apply to a person subjected to preventive detention under any law for the time being in force. It is submitted that since Anilbhai Patel and Meenaben Gohil were in lawful custody of the

police in connection with the offences for which FIRs were filed, there was nothing illegal in the election meeting being held and their not being in a position to vote at the meeting.

REJOINDER ON BEHALF OF PETITIONERS

18. In rejoinder, Mr SB Vakil, learned counsel for the petitioner in SCA No.22391 of 2005 (defeated candidate) submitted as under:-

18.1(i) It is not always that disputed questions of fact cannot be decided in a writ petition. Reliance is placed on the decision in (1974) 2 SCC 706.

(ii) It is the nature of controversy which will be taken into account by the Court for deciding whether factual questions are required to be decided or not. If the parties are relegated to a civil suit, by the time the suit is decided, the term of two and a half year will be over and the first respondent having won the election with the support of the police officers arresting the two councillors will succeed in his design. This is not a case where any oral evidence is required as the tell-tale circumstances of the case themselves are sufficient to draw necessary inferences and conclusions against the respondents.

(iii) A question of fact does not necessarily require oral evidence. In the facts of the case, the principle of res ipsa loquitor deserves to be invoked.

(iv) The plea of waiver is not raised in the respondents' pleadings and such a contention cannot be permitted to be raised at the time of arguments without foundation or pleading. The protest was made against the police arrest before the meeting commenced and also after the meeting commenced as is clear from the video recording. Reliance is placed on the decisions in -

(i) AIR 1965 SC 1310
(ii) (1996) 2 SCC 12
(iii) (1998) 8 SCC 518

18.2 As regards the applications of the two councillors who were not arrested by the police and still did not attend the meeting, the learned counsel for the petitioners have opposed their applications and submitted that these applications are in the nature of recrimination application similar to application under Section 97 of the Representation of the People Act, 1951. It is, however, submitted that admittedly these two applicants were neither arrested by the police nor were they prevented by any person from attending the meeting. The applicants themselves

have not made any allegations about use of any force by any person. The allegations about deceitful means etc. are denied in the affidavit. In reply filed by the defeated candidate Vijaybhai Haribhai Patel, strong reliance is placed on the press note dated 3.1.2006 wherein Kantibhai Chavda, General Secretary, BJP, Anand district has informed the press that in spite of the terrific public opinion in favour of the BJP at the elections to the local self-government institutions in October 2005, two BJP councillors of Anand Municipality committed breach of the party mandate as they did not remain present at the meeting of the Municipality held on 8.11.2005 for electing the President/ Vice President of the Municipality, because they were not found suitable for the office of the President/ Vice President or any office in the Standing Committee. It was also stated in the press note that the said two candidates were trying to file false affidavits to avoid any disciplinary proceedings of the party for not carrying out the mandate of the party at the time of elections. It is, therefore, submitted that there was no question of the defeated candidate employing any deceitful means to keep the two applicants out of the meeting but it was because the applicants themselves were not going to get any elective office like President / Vice President or any office in the Standing Committee and, therefore, they did not attend the meeting of the Municipality held on 8.11.2005.

DISCUSSION

19. As regards the contention that the offence registered against Anilbhai Patel and Meenaben Gohil are non-cognizable bailable offences, the Court is not inclined to accept this contention because the offence under Section 68A of the Copy Right Act is punishable for imprisonment upto three years and, therefore, in view of the provisions of Schedule II to the Code of Criminal Procedure, 1973 the offence would be cognizable and non-bailable. It is, however, to be noted that co-accused of Anilbhai Patel, Pareshbhai Patel was arrested in the evening of 5.11.2005 and released in the morning of 6.11.2005 without being produced before any Magistrate or without the said accused having obtained any order of bail from the competent Court.

20. As far as the offences under the Prohibition Act are concerned, Section 118 and 119 thereof are as under: -

> “118. In the absence of any provision to the contrary in this Act the provisions of the Code of Criminal Procedure, 1898, with respect to cognizable offences shall apply to offences under this Act.
>
> 119. Offences under sections 65, 67, 67-IA and 68 shall be non-bailable.

The offences for which the maximum sentence is provided are offences under Sections 65 and 66A. In the FIR reference is made to Sections 66(1)(b) and

81. Section 66(1)(b) read as under:-

> “66(1) Whoever in contravention of the provisions of this Act, or of any rule regulation or order made, or of any licence, permit, pass or authorization issued, thereunder -
>
> (b) consumes, uses, possesses or transports any intoxicant other than opium or hemp,
>
> shall on conviction be punished with imprisonment for a term which may extent to two years which may extent to 2000 Rs. for a third or subsequent offence.

Punishment for the first or the second offence is lesser.

Section 81 provides for punishment for abetment shall be the same punishment as provided for the principal offence.

The allegations in the FIR constitute offence under Section 66 (1)(b) and 81 for which the maximum sentence is two years.

The allegations in the FIR only constitute offences under Section 66(1)(b) for which the maximum sentence is two years and accused Premilaben named as accused in the FIR under the Prohibition Act was

arrested on 5.11.2005 and released on 6.11.2005 after having been granted bail by the Magistrate.

It is also relevant to note that it was stated in the FIR that the police on patrol duty had received information that one Popatbhai Gohil was involved in sale of country made liquor and Indian made Foreign liquor and on that basis, a prohibition raid was carried out, but no FIR is filed against any Popatbhai Gohil or even against Parbatbhai Gohil, who is the husband of councillor Meenaben Gohil, but Parbatbhai Gohil is shown as the husband of a lady called Premilaben, who was found at the place of the raid. It is, however, not necessary to go into the merits of such contentions raised by the petitioners because this Court is of the view that it is the timing of the arrest which calls for serious discussion.

21. Even assuming that the offences were non-cognizable, the fact remains that the police officers themselves had not treated the offences so serious as to seek continued detention of Pareshbhai in the Copy right infringement case for more than 24 hours. In fact Pareshbhai was released by the police officers without order of any Magistrate. This discussion is relevant in order to show that Anilbhai Patel and Meenaben Gohil, residents of Anand and elected councillors of Anand Municipality could not have been treated as accused involved in grave offences like offences under the POTA or any such

similar heinous crime that the police officers could not have delayed their arrest even by an hour or two, that is till they came out of the meeting hall after completion of elections. The very fact that another councillor called Alpesh Patel who was involved in an offence punishable under Section 302 IPC and was in judicial custody was permitted to participate in the same election meeting under the orders of the Court and that the police escort was kept outside the meeting hall indicates that nothing would have been lost if the police officers had permitted Anilbhai Patel and Meenaben Gohil to enter the meeting hall and participate in the election meeting and thereafter arrested them.

22. The allegation made by the three petitioner-councillors that two of them - Anilbhai Patel and Meenaben Gohil were arrested to prevent them from attending the meeting where elections were scheduled and that this was done in order to prevent them from participating at the election meeting so that they cannot exercise their vote, is borne out from the following circumstances:-

(i) The number of candidates elected under the banner of BJP were 19 out of 42 councillors and remaining councillors were elected as independent councillors. Two of the BJP councillors Shwetalkumar A Patel and Chetankumar M Patel did not remain present at the election meeting of the Municipality

on 8.11.2005.

(ii) In press note dated 3.1.2006, (Annexure-I to the reply affidavit of Vijaybhai Patel in CA Nos.12966 and 12967 of 2005) Kantibhai Chavda, General Secretary of Bhartiya Janta Party, Anand District (a party respondent in all the three petitions), it clearly stated that two BJP councillors of Anand Municipality had committed breach of the party mandate by not remaining present at the meeting of the Municipality held on 8.11.2005 for electing President/ Vice President of the Municipality because they were not found suitable for the office of the President or Vice President or any office of the Standing Committee.

(iii) After the election program was declared on 29.10.2005 for 8.11.2005 and after the 21 councillors forming Anand Shaher Vikas Manch (including the two petitioners) had gone out of Anand as group on 4.11.2005, FIRs were filed against two of them on 5.11.2005.

(iv) The police themselves did not consider either of the above two concillors as having committed any serious offence. In fact, co-accused in one case was released without being produced before a Magistrate and without his having obtained bail. The

maximum punishment for the offence under the Copy Right Act is three years. The co-accused in the other case was released after being produced before the Magistrate. In the case under the Prohibition Act also the allegations in the FIR constitute an offence for which the maximum sentence is two years. The FIR proceeded on the basis of a report about bootlegging activities of a person who is himself not arrested, but his wife councillor Meenaben Gohil came to be arrested. Both the arrests were made half an hour before the scheduled time of the election meeting.

(v) The police bandobast was made outside the meeting hall on account of the scheduled elections of President and Vice President. The petitioners' case that the police authorities about to arrest them were requested to allow them to participate in the election meeting and to arrest them after completion of the meeting is not denied in the affidavit filed by the police officers.

(vi) On 8.11.2005 itself, before going to the meeting hall, petitoiner - Anilbhai Patel had filed Misc. Criminal Application No.507 of 2005 for anticipatory bail in the Court of learned Joint District and Addl. Sessions

Judge, Anand specifically stating that he was elected as a councillor by a large majority and he intended to contest for the office of the Vice President and that he will not be able to vote for the President of his choice and to prevent him from doing it he was being pressurized not to contest at the elections scheduled on that day. Hence a false complaint was filed at the instance of the political leaders in connivance with the LCB police and he was apprehending arrest so that he will be kept in detention during the period when the election will be held. This application was filed by the applicant before he went to the election meeting hall where he was arrested at 12.30 PM. Since no orders were passed at the time of filing the application, in view of the arrest at 12.30 PM and the order of the learned Magistrate granting him bail at 5.00 PM, the application became infructuous and was withdrawn on 11.11.2005.

(vii) After arresting councillors Anilbhai Patel and Meenaben Gohil at around 12.30 PM just half an hour before the scheduled time for elections, the police officers did not produce them before the Magistrate immediately, but took them around Anand town in the police van and produced them before the Magistrate only at about 5.00 PM, by

which time the elections were already held and the results were also declared. These averments made in para 4.9 in Special civil Application No.22379 of 2005 of Anilbhai Patel and in para 3.9 in Special Civil Application No.22385 of 2005 of Meenaben Gohil are not denied by any of the police officers although they are joined as respondents in both the petitions and although they have filed affidavits generally denying allegations of malafides.

(viii)On the very next day i.e. on 9.11.2005 Anilbhai Patel filed a complaint in the Court of the learned JMFC, Anand being Criminal Case No.6233 of 2005 pointing out the events that took place on 8.11.2005 alleging that the complainant-petitioner and a lady councillor were taken in the police van in order to prevent them from voting at the elections of President and Vice President of the Municipality and in the said complaint he had named the following persons as witnesses:-

Mohammed Safi Gulamnabi Vohra
Idrishbhai HajiIsmailbhai Vohra alias Bhanabhai
Shashikant Manubhai Patel

Although the complaint was filed on

9.11.2005 and the learned JMFC passed order dated 10.11.2005 directing the Superintendent of Police to conduct investigation into the allegations made in the complaint under Section 202 of Cr PC and produce the report before the Court, till the date of conclusion of arguments, no such report is filed before the learned Magistrate nor is any such report brought to the notice of this Court till today.

(ix) The police officers have not pointed out a single circumstance to show that it would have been inexpedient to wait till the elections were over before effecting arrest of Anilbhai Patel and Meenaben Gohil. Both the councillors are residents of Anand and their co-accused in the respective offences were released by the police officers after arresting those co-accused on 5.11.2005. In fact Pareshbhai Patel (co-accused of Anilbhai Patel in the Copy Right case) was released without producing him before the learned Magistrate or without any bail order granted by any Court.

(x) Popatbhai Gohil against whom the police on patrol duty had received information about violation of the Prohibition Act - his correct name appears to be Parbatbhai Gohil (husband of councillor Meenaben Gohil) - is

not shown to have been arrested. In short, the allegations contained in the FIR were not treated as serious by the police themselves. On the contrary, in para 4 of the affidavit in reply of the fifth respondent – RB Patel, Police Inspector, Anand Town Police Station in SCA No.22385 of 2005, it is specifically stated that as per the statement of Premilaben, a close relative of petitioner – Meenaben Gohil, seized stock of liquor (three bottles of Indian made Foreign liquor and 12 litres of country liquor) was kept for using during the election and for the purpose of celebrating post election celebrations. Even according to the police authorities, Meenaben Gohil and other independents of the Anand Shaher Vikas Manch had gone out of Anand from 4.11.2005 to 7.11.2005 and the election was that of the President of the Municipality on 8.11.2005 at 1.00 PM.

The fifth respondent has produced a statement indicating the offences registered against Pratapbhai R Gohil, husband of councillor – Meenaben Gohil under the Bombay Prohibition Act, but the police officers have not shown a single circumstance to show that councillors Anilbhai Patel and Meenaben Gohil would have escaped and avoided arrest if they were allowed to go

inside the meeting hall for voting at 1.00 PM and if they were not arrested till the meeting for electing President and Vice President was over.

(xi)The petitioner has made specific allegations in paras 3.8 and 3.9 of the petition as to how respondent Nos.3, 4 and 5 are able to continue their postings at Anand on account of the political influence of respondent Nos.8 and 9. Although the allegations are baldly denied by respondent Nos.6 and 9 in their affidavits dated 6.12.2005, the police officers respondent Nos.3, 4 and 5 have not at all dealt with those allegations in their affidavits-in-reply. All that the police officers have stated in their affidavit is that they were bound to arrest Anilbhai Patel and Meenaben Gohil in view of the FIRs filed against them.

(xii) Respondent No.5 Police Inspector RB Patel has already taken shield behind the pendency of criminal complaint in which Superintendent of Police was directed on 10.11.2005 to carry out the investigation under Section 202 Cr PC. Till today no such report is shown to have been filed before the learned Magistrate nor is a copy of such report produced before this Court.

23. At this stage, it is not necessary for the Court to give any specific finding as to whether concerned police officers - respondent Nos.3 to 5 have been enjoying any patronage of any particular local political leaders The Court cannot, however, be oblivious of the manner in which the police force is some times used for political purposes as has been noticed in several reports of the National Police Commissions.

24. At this stage, the Court would refer to some of the recommendations of the Police Commissions of India as published by the National Crime Records Bureau, Ministry of Home Affairs, Government of India in October 1997. The National Police Commission, 1977 headed by Shri Dharam Vira (retired Governor) submitted report dated 31.5.1981. The summaries of observations and recommendations of the second report of the said National Police Commission make instructive but sad reading. Paragraph 18.50 of the report of the said Commission deals with interference with the misuse of police by illegal or improper orders or pressure from political, executive or other extraneous sources and remedial measures therefor. Paragraph 18.53 gives illustrations of some typical situations or matters in which pressure is brought to bear on the police by political, executive or other extraneous sources -

(i) Arrest or non-arrest of a person against whom a case is taken up for investigation by

the police.

(iii) Release or non-release on bail after arrest.

(vii) Taking persons into preventive custody to immobilise them from legitimate political activity in opposition to the party in power.

(x) Discretionary enforcement of law while dealing with public order situations, with emphasis on severity and ruthlessness in regard to persons opposed to the ruling party.

(x) Manoeuvring police intervention by exaggerating a non-cognizable offence or engineering a false complaint to gain advantage over another party in a situation which will lie outside the domain of police action in the normal course.

(xi) Preparation of malicious and tendentious intelligence reports to facilitate action against an opponent.

(emphasis supplied)

In Paragraph 18.54, the Commission states that pressure on the police takes a variety of forms ranging from a promise of career advancement and

preferential treatment in service matters if the demand is yielded to, and a threat of drastic penal action and disfavoured treatment in service matters if the pressure is resisted. Paragraph 18.55 of the report states that several officers in various States brought to the notice of the Commission the phenomenon of frequent and indiscriminate transfers ordered on political considerations. Paragraphs 18.57 and 18.60 are required to be quoted verbatim and they read as under:-

> "18.57 Interference with the police system by extraneous sources, especially the politicians, encourages the police personnel to believe that their career advancement does not at all depend on the merits of their professional performance, but can be secured by currying favour with politicians who count. Deliberate and sustained cultivation of a few individuals on the political plane takes up all the time of a number of police personnel to the detriment of the performance of their normal professional jobs to the satisfaction of the general public at large. This process sets the system of the downward slope to decay and total ineffectiveness.
>
> **18.60 A police force which does not remain outside politics but is constantly subjected to influences and pressures emanating within the system from the politicised police personnel themselves will in turn seriously disturb the stability of the duly elected political leadership in the State itself and thereby cause serious damage to the fabric of our democracy. This danger has to be realised with equal seriousness and concern by the politician as well as by the police**."
>
> (emphasis supplied)

In the Eight report, the Commission deals with accountability of police performance and para 65.7 makes the following recommendations :-

> "65.7 The responsibility should be squarely fixed on the officers of the level of SP and above to carefully watch the reputation of SHOs and take appropriate measures wherever warranted. Any failure on their part in this regard should be seriously viewed. In those circumstances where the supervisory officer may either fail to assess the reputation of the SHO or fail to take appropriate action in a particular instance, the people have a right to petition to the State Security Commission. In the event of such complaints, the State Security Commission should gauge the reputation of the SHO concerned and take such action as may be required."

25. In the backdrop of the circumstances narrated in paras 21 and 22 hereinabove and the observations made in the report of the Police Commissions as quoted in the preceding paragraph, we have no hesitation in coming to the conclusion that the arrest of the two municipal councillors Anilbhai Patel and Meenaben Gohil was made at such time and for such duration with the sole intention of preventing them from attending the meeting for election of President and Vice President of the Anand Municipality on 8.11.2005 at 1.00 PM. Both the abovenamed municipal councillors have stated in their petitions and also at the hearing that they wanted to cast their vote in favour of the candidates sponsored by Anand Shaher Vikas Manch for the office of

President (Vijaybhai Haribhai Patel) as well as for the office of Vice President of the Anand Municipality and they wanted to exercise their vote against the official candidates of Bhartiya Janata Party. The petitioners' case is that since respondent- Mohammed Shafi Gulamnabi Vohra, Councillor sponsored by the Anand Shaher Vikas Manch has otherwise been declared elected for the office of Vice President by draw of lots, they are not challenging the election to the office of Vice President.

26. In view of the above finding, we quash and set aside the election of first respondent Jayrajbhai Jayantibhai Patel to the office of President of Anand Municipality at the meeting held on 8.11.2005 as illegal. Accepting the contention of the petitioners that they are not challenging the election of Mohammed Safi Gulamnabi Vohra to the office of Vice President of Anand Municipality, we are not disturbing the election to the office of Vice President of the Anand Municipality, the result of which was declared on 8.11.2005.

27. The next question is whether and what further relief should be granted after quashing the election of the first respondent.

As already indicated earlier, Mr SB Vakil, learned counsel for the second respondent and Mr Iqbal Saiyed for the two councillors (who were

arrested by the police and prevented from voting at the elections on 8.11.2005) have submitted that the Court should also declare defeated candidate Vijaybhai Patel as having been elected to the office of President because at the meeting held on 8.11.2005 there was a tie of 19 votes in favour of Vijaybhai Patel and 19 votes in favour of Jayrajbhai Patel (first respondent) and the first respondent was declared as elected only by draw of lots. Hence the Court should declare that since Anilbhai Patel and Meenaben Gohil wanted to, and still want to, vote in favour of Vijaybhai Patel, Vijaybhai Patel would have secured 21 votes and, therefore, there is no need for holding any fresh elections to the office of President on the floor of the Anand Municipality.

28. Mr Nageshwar Rao with Mr Asim Pandya for respondent No.1 have submitted that the only relief which should be granted after setting aside the election of the first respondent would be fresh elections to be directed to be held at the meeting of the councillors at Anand because that is the only legal manner of holding elections to the office of the President.

Mr YF Mehta for the applicants in Civil Application No.12966 and 12967 of 2005 has supported the stand of the first respondent.

29. The learned counsel for the three petitioners would, however, urge that in view of

passage of time and particularly after issuance of notice in the present petitions, equations would have changed by manipulating the majority in such a manner that the first respondent may still be in a position to retain the office of President by first acting in collusion with the police officers on 8.11.2005 and thereafter by such manipulations - there would be no sanctity of the Rule of Law.

30. Before giving any finding on the above controversy, it is first necessary to deal with Civil Application Nos.12966 and 12967 of 2005 filed by two BJP councillors - Shwetalkumar Patel and Chetankumar Patel who were not present at the election meeting held on 8.11.2005. There is substance in the contention of Mr SB Vakil for the petitioner that these applications are in the nature of recrimination applications for supporting the elected candidate as contemplated by Section 97 of the Representation of the People Act, 1951. It is, therefore, necessary to decide these applications first.

31. Having carefully gone through the said applications and having heard Mr YF Mehta in support of the same, it is not possible to hold that the said two councillors – Shwetalkumar Patel and Chetankumar Patel were prevented from attending the election meeting held on 8.11.2005. It is not even the case of the said applicants that any physical force or any other force was used by the defeated candidate (Vijaybhai Patel) or by any other councillor. In fact

the uncontroverted averments made in the affidavit in reply of Vijaybhai Haribhai Patel to the said civil applications and particularly the annexure to the said affidavit being press note dated 3.1.2006 issued by Kantibhai Chavda, General Secretary of Bhartiya Janata Party, Anand district indicate that the two BJP councillors (these two applicants) had remained absent at the election meeting on 8.11.2005 because they were not found suitable for the office of President, Vice President or a member of Standing Committee and, therefore, they had deliberately remained absent at the said meeting to embarrass Bhartiya Janata Party and thereafter they filed false affidavit to avoid disciplinary proceedings by the party.

In view of the above pleadings of the parties, we have no hesitation in holding that Shwetalkumar Patel and Chetankumar Patel were not prevented from attending the election meeting held on 8.11.2005 and their applications deserve to be dismissed.

32. In view of the above finding and in view of the clear and consistent stand of Anilbhai Patel and Meenaben Gohil who were prevented from attending the meeting on 8.11.2005 that they wanted to vote in favour of the presidential candidate nominated by Anand Shaher Vikas Manch being the group of independents and that Vijaybhai Patel was the candidate nominated by the said group of independents

and also the clear stand of the petitioners – Anilbhai Patel and Meenaben Gohil at the hearing of these petitions (para 27 hereinabove) and also on the date of pronouncement of this judgment, the Court directs that the votes of Anilbhai Patel and Meenaben Gohil be treated as having been cast in favour of Vijaybhai Haribhai Patel (petitioner in SCA No.22391 of 2005) and, therefore, the Collector, Anand is required to be directed to declare Vijaybhai Patel as having been elected as President of Anand Municipality.

33. The Court might have considered accepting the plea of the respondents that the elections be directed to be held afresh because ordinarily in such cases even if the Court were to direct that Vijaybhai Patel be declared as having been elected by a majority of 21 votes as against 19 votes secured by the first respondent, it would be possible for the councillors at the general meeting to pass a vote of no confidence by a simple majority and accordingly remove the person holding the office of the President. In this context, the provisions of Section 36 of the Gujarat Municipalities Act have a great bearing on this aspect because Section 36(2) provides that the motion of no confidence against President or Vice President of a Municipality can be carried by a majority of not less than two-third of the total number of councillors. Hence the first respondent who got elected on the strength of draw of lots on account of the tie resulting from arrest of two

councillors of the opposite group just before the election meeting cannot be allowed to take the advantage of the ordinary procedure which the Court might have followed in any other case where the elected President of local self-government institution may be removed by a motion of no confidence by a simple majority.

34. As regards the contention of waiver, on the basis of the material produced by the petitioners themselves and also having watched the video recording of the proceedings of the election meeting held on 8.11.2005, it is not possible to hold that the petitioners had acquiesced into the infringement of their rights or had waived their remedies. Immediately after arrest of Anilbhai Patel and Meenaben Gohil at about 12.30 PM, Mohammed Shafi Gulamnabi Vora had protested at above 12.43 PM within the precincts of the Municipality Building and just outside the election hall that the arrests are made because the police was colluding with the party in power (in the State). At 1.05 PM also councillor Shashikant M Patel stood up before the election officer Resident Deputy Collector and protested that the two councillors arrested just before the meeting were not accused of any serious crime. Immediately after declaration of the results also, the group of independents stated before the videographer in the election hall that democracy had been murdered by arrest of two independent councillors just before the elections. The Video CDs were seen by the Court in

the Court room in presence of the learned advocates for the parties.

35. In **Bar Council of Delhi vs. Surjeet Singh AIR 1980 SC 1612 = (1980) 4 SCC 211,** the Apex Court has held that merely because a candidate takes part in the election by standing as a candidate or by exercise of his right to franchise, he cannot be estopped from challenging election when the election is glaringly illegal and void nor will the principle apply that one cannot approbate and reprobate. In the said decision, the Apex Court also approved the following dictum of the Full Bench of the Nagpur High court in **Kanglu Baula Kotwal vs. Chief Executive Officer, Janpad Sabha, Durg (AIR 1955 Nag 49) :-**

> "As regards the petitioners who were also candidates at the elections but were defeated, the learned counsel said that those who took their chances at the elections and failed should not now be allowed to challenge elections of their opponents on the ground that the electoral polls were defective. The plea is in substance one of estoppel. There can be no question of any estoppel, because it cannot be said that the position of the other side has in any way altered by reason of something done or not done by the petitioners."

36. The time of eight days taken by the petitioners in moving this Court cannot be said to be unreasonable. After the elections on 8.11.2005, one of the councillors Anilbhai filed a complaint before the learned Magistrate on 9.11.2005 and the learned Magistrate passed an order on 10.11.2005 directing

investigation to be conducted by Superintendent of Police. Hence filing of all these three petitions on 16.11.2005 can never be said to be suffering from delay.

37. The Court has not thought it necessary to make a detailed reference to the provisions of the Representation of the People Act, 1951, particularly Section 97 and 101 thereof. In fact where there are specific statutory provisions providing for the forum and remedy for deciding election disputes, the provisions of the Representation of the People Act may not even apply. However, the Gujarat Municipalities Act and the rules for electing President and Vice President of the Municipalities do not contain any machinery and forum for determining disputes relating to election of President and Vice President of Municipalities. Hence the Court has proceeded to deal with these petitions on merits in exercise of its jurisdiction under Article 226 of the Constitution. The Court has of course acted on the principles analogous to the principles underlying Sections 97 and 101 of the Representation of the People Act, 1951. The Court has found that the first respondent got elected as the President of the Municipality on account of two petitioners herein having been prevented by the police officers from attending election meeting and both the petitioners have been stating right from day one that they always wanted to vote for electing Vijaybhai Patel as President of Anand Municipality and before this Court

also they have always taken the same consistent stand throughout.

38. Having gone through the various authorities cited by the learned counsel for the respondents, we do not find that they have any bearing on the questions involved in these petitions. The uncontroverted facts are already highlighted in this judgment and are so glaring that for merely deciding what inferences should be drawn, the petitioners need not be relegated to the alternative remedy of suit. The scope of judicial review is always limited in such cases but even within the limited scope of judicial review, on the basis of the material on record, we have found great substance in the submissions made on behalf of the petitioners that this was a case where police power was used for interfering with the democratic process of electing President and Vice President of a Municipality. More than two centuries back **James Madison** had stated -

> **"I believe there are more instances of the abridgement of freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."**

Here is a case where by brazen encroachments by those who had the police force ready to oblige them, the freedom of the people to elect the President of their Municipality through their councillors was abridged by the not so subtle method

of getting the two elected councillors prevented from voting at the election of President of the Municipality. It is, therefore, the constitutional duty of this Court to exercise its powers under Article 226 of the Constitution.

39. In view of the above discussion, all the petitions are accordingly allowed in the following terms :-

(i) The election of first respondent – Jayrajbhai Jayantibhai Patel as President of Anand Municipality as per the result declared by Resident Deputy Collector Anand on 8.11.2005 is hereby set aside.

(ii) Vijaybhai Haribhai Patel petitioner in SCA No.22391 of 2005 - is hereby declared as having been elected as President of Anand Municipality at the general meeting of the Municipality held on 8.11.2005.

(iii) Director General of Police, Gujarat State shall, within two months from the date of receipt of this judgment, look into the allegations made in Special Civil Application No.22385 of 2005 about the patronage of the local political leaders being enjoyed by respondent Nos.3 to 5 and take such action as may be warranted in public interest.

(iv) The petitioners in Special Civil Application Nos.22379 and 22385 of 2005 are permitted to delete the prayer clause for compensation for their arrest and are granted liberty to file other substantive proceedings for the same.

40. Civil Application Nos.12966 and 12967 are dismissed.

(M.S. SHAH, J.)

(SHARAD D DAVE, J.)

At this stage, Mr Asim Pandya for the first respondent prays for stay of operation of this judgment and submits that first respondent – Jayrajbhai Jayantibhai Patel is already holding the office of President of the Municipality and that the first respondent would like to have further recourse in accordance with law.

The learned counsel for the petitioners oppose the request.

Having heard the learned counsel on this request, we reject the request for stay of operation

of directions Nos.(i), (iii) and (iv). However, as far as declaration No.(ii) is concerned, the operation of the said declaration shall remain stayed till 10th March 2006.

(M.S. SHAH, J.)

(SHARAD D DAVE, J.)

zgs/-